

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

THE SERBIAN CROWN, VIRGINIA, INC. }

Plaintiff, }

VS. }

GOOGLE, INC. }

Defendant. }

Civil No. 14-cv-547

August 14, 2014

MOTIONS HEARING

BEFORE: THE HONORABLE GERALD BRUCE LEE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: LAW OFFICES OF CHRISTOPHER R. RAU
BY: CHRISTOPHER R. RAU, ESQ.

FOR THE DEFENDANT: WILSON, SONSINI, GOODRICH & ROSATI
BY: DAVID H. KRAMER, ESQ.
CREIGHTON J. MACY, ESQ.

OFFICIAL COURT REPORTER: RENECIA A. SMITH-WILSON, RMR, CRR
U.S. District Court
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1 (Thereupon, the following was heard in open
2 court at 3:01 p.m.)

3 THE CLERK: 1:14 civil 547, The Serbian
4 Crown, Virginia, Incorporated versus Google, Inc.

5 Would counsel please note your appearances
6 for the record.

7 MR. RAU: Good afternoon, Your Honor. I'm
8 Christopher Rau. I represent the plaintiff, The Serbian
9 Crown of Virginia, Incorporated.

10 THE COURT: Good afternoon, Mr. Rau.

11 MR. MACY: Good afternoon, Your Honor. My
12 name is Creighton Macy with Wilson, Sonsini, Goodrich &
13 Rosati representing Google.

14 And I'd also like to introduce my colleague
15 from California, Dave Kramer who has been pro hac-ed and
16 will be speaking on behalf of Google today.

17 Thank you.

18 THE COURT: Good afternoon, Mr. Macy.

19 Good afternoon, Mr. Kramer.

20 MR. KRAMER: Good afternoon, Your Honor.

21 THE COURT: I'm ready.

22 MR. KRAMER: May it please the Court, Your
23 Honor, we are here to discuss The Serbian Crown's claim
24 for false advertising under the Lanham Act against Google
25 for temporarily displaying on a page within the Google

1 Places directory service inaccurate information about the
2 restaurant's operating hours.

3 As we explained in our papers, The Serbian
4 Crown fails to state a claim for false advertising for
5 three reasons. The first and most straightforward reason
6 that there is no claim for false advertising is that
7 there is no advertising.

8 Google's directory and the page devoted to
9 The Serbian Crown is not an ad. The cases that are on
10 point here include *Goodman versus Doe* which involves some
11 blog postings about a plaintiff's business, *Neurotron*
12 which involved a trade journal about a competing medical
13 device, and *Nemet*, this Court's own decision, which
14 involved user reviews of an advertising -- of a car
15 dealer, I'm sorry.

16 This wasn't a Google ad. There are four
17 requirements under the case law to demonstrate that
18 something constitutes an advertising -- that constitutes
19 an advertisement, I should say.

20 The first is that it must constitute
21 commercial speech. Commercial speech is speech that does
22 no more than propose a commercial transaction.

23 THE COURT: So, are you saying that when
24 someone types in Serbian Crown in Google Maps and they
25 get a listing and a telephone number, that that's not

1 intended to further commercial transaction?

2 MR. KRAMER: It is not, Your Honor. It is
3 not intended to promote a commercial transaction. It
4 does not promote a commercial transaction. It may allow
5 for a user to connect with The Serbian Crown restaurant
6 and thereafter engage in commerce.

7 But what Google is posting there is merely
8 informational -- informational listings much in the way
9 of an encyclopedia or a directory, not an ad.

10 THE COURT: I thought I understood that
11 Google did not provide the information. The information
12 was provided by someone else; is that right?

13 MR. KRAMER: With respect to the information
14 that's at issue here, that's correct, Your Honor.

15 THE COURT: All right.

16 MR. KRAMER: The information that's at issue
17 in this case is the inaccurate hours information that the
18 plaintiff alleges appeared on that page for the
19 restaurant, and that information does not come from
20 Google. It is not alleged to have come from Google in
21 the complaint.

22 And I can address that question when we get
23 into the context of the Communications Decency Act which
24 is a separate defense to the plaintiff's claim, a
25 separate reason why it fails to state a claim for false

1 advertising.

2 THE COURT: Well, you said first that you had
3 three reason. The first was it was not an advertisement.

4 MR. KRAMER: Correct, the second is a failure
5 to allege facts from which it can plausibly be deemed
6 to -- the inaccurate information can plausibly be deemed
7 to have caused the injury about which the plaintiff
8 complains.

9 THE COURT: Is that proximate cause?

10 MR. KRAMER: Proximate cause, I could have
11 said it that way. I would have saved some words, Your
12 Honor.

13 Yes, so the first issue is it's not an ad as
14 a matter of law. The second is there's no proximate
15 cause sufficiently alleged or plausibly alleged in the
16 complaint. And the third is that the claim is barred as
17 a matter of law by the Communications Decency Act.

18 And this is not simply a pleadings problem.
19 This is -- these are deficiencies that the plaintiff
20 could not overcome and, therefore, we ask that the Court
21 dismiss with prejudice, The Serbian Crown's complaint.

22 I can go back and walk through those reasons
23 if the Court would like.

24 THE COURT: Well, actually I've read your
25 brief, but I know you came from California. So what I'd

1 like to do is focus you if I could.

2 MR. KRAMER: Sure.

3 THE COURT: Your view is that the
4 Communications Decency Act which is I think Section 230
5 of the Telecommunications Act precludes state claims and
6 this claim under the Lanham Act; is that right?

7 MR. KRAMER: It does, Your Honor, yes. The
8 statute precludes any claim, no matter what it's labeled
9 to the extent it seeks to treat an interactive computer
10 service as responsible for content uploaded to the
11 service or supplied to the service by a third party. It
12 doesn't matter what the label is.

13 There is an exception to the statute for IP
14 claims, but false advertising is not an IP claim, an
15 intellectual property claim.

16 THE COURT: Why isn't it an intellectual
17 property claim?

18 MR. KRAMER: The Supreme Court in the *College*
19 *Savings Bank* case, a case against the State of Florida
20 makes very plain that false advertising is different from
21 the other aspects of the Lanham Act which protect
22 trademarks. False advertising is about protecting
23 consumer expectations. There is no property right at all
24 in false advertising, much less a right to exclude which
25 is the hallmark of an intellectual property claim.

1 So, the Supreme Court in that case says as
2 much. Courts that have addressed this issue specifically
3 and looked at the interplay between a false advertising
4 claim and the Communications Decency Act have held as
5 much. The *CCBill* case, the District Court there said
6 false advertising is not an intellectual property claim.
7 The *Earthlink* case that we cited say not an intellectual
8 property claim. Actually, the *Earthlink* claim doesn't
9 specifically address this question.

10 The *Barnes* case, the Ninth Circuit, very
11 strongly indicates that claims that are based on
12 advertisements that others supply would not give rise to
13 a claim for false advertising against an online service
14 provider.

15 There is no case that we were able to find
16 that says false advertising is an intellectual property
17 claim. There are Lanham Act claims based on trademarks
18 that clearly fall outside 230's protection. But this
19 circuit and a host of others have made clear that 230 is
20 supposed to be given very expansive readings with respect
21 to its protections and very narrow readings with respect
22 to its exceptions, less the immunity that Congress
23 bestowed upon online service providers in the interest of
24 promoting online discourse be undermined by artful
25 pleading.

1 So, calling a defamation claim false
2 advertising or calling it negligence or calling it
3 tortious interference doesn't change the nature of the
4 action. To the extent it is not a copyright claim or a
5 trademark claim, it is not within the intellectual
6 property exception to 230(c). It doesn't matter that
7 it's a federal claim.

8 THE COURT: Does the *Lexmark* case change the
9 analysis of the proximate cause question?

10 MR. KRAMER: I don't think it does change the
11 analysis on proximate cause. It changes the analysis
12 certainly on the question of whether the parties need to
13 be in direct competition. But it doesn't change the
14 time-honored concepts of proximate cause. You need to
15 allege in a way that is -- in the -- judicial experience
16 and common sense of the court, a plausible connection
17 between one online service inaccurately stating hours
18 information for a temporary period, while everybody else,
19 according to the complaint, had it right and the ultimate
20 demise of the business a year later which is the
21 connection that the plaintiff asks the Court to draw in
22 its complaint and in its opinion. We don't think that's
23 plausible.

24 There's no allegation here of who saw this or
25 that someone saw this or lots of people saw this and

1 decided not to patronize the restaurant.

2 The one person that's identified as having
3 seen this called the restaurant. The restaurant
4 corrected their misimpression about the hours of
5 operation and presumably, there was no impact.

6 So, absent allegations that make plausible
7 proximate cause we don't believe it's satisfied here and
8 the answer to the Court's question is *Lexmark* does not
9 change that.

10 THE COURT: All right. As it relates to the
11 initial claim that has been brought here, the false
12 advertising claim, you say that Google did not post the
13 information. So clearly Google is an information content
14 provider. There is no question about that.

15 MR. KRAMER: Google is not information
16 content provider. It is in the role of interactive
17 computer service --

18 THE COURT: I'm sorry, interactive computer
19 service. That's the right term.

20 MR. KRAMER: Those are the two actors that
21 the CDA speaks to. So it is an online host with respect
22 to the information that's at issue here, the hours
23 information.

24 The plaintiff, by the way, Your Honor, does
25 not allege that Google posted this information. The

1 complaint alleges it was Google or someone else. Well,
2 that's a truism. Of course it was Google or someone
3 else. Someone put this information there.

4 But, the complaint does not allege that
5 Google itself posted the information. It alleges that
6 Google sponsored this information.

7 The Ninth Circuit in the *Black versus Google*
8 case, a very similar case to this one, looked at the
9 allegations of sponsorship and said, gees, if I let
10 sponsorship allegations suffice for purposes of the CDA,
11 I'm going to allow an end run around the immunity and
12 around congressional intent. You as an online service
13 are not responsible if you did not put it there. And
14 that's true even if Google purchased the inaccurate hours
15 information from someone else.

16 There are cases like *Blumenthal versus Drudge*
17 and the *Earthlink* case and the *Nasser* case, all of which
18 say it doesn't matter even if you bought this stuff, even
19 if you are paying someone to provide it and it turns out
20 to be inaccurate, you are not responsible for it as
21 online service in the interest of free and open discourse
22 online.

23 THE COURT: All right. Well, I think I
24 understand your position. Let me hear from the other
25 side and I'll give you a chance to respond.

1 MR. KRAMER: Thank you, Your Honor.

2 MR. RAU: Your Honor, if it please the Court,
3 I'd like to address counsel's arguments in turn.

4 THE COURT: All right.

5 MR. RAU: And, I guess what I'd like to start
6 with on this is to pose what's not really a hypothetical
7 to the Court which is if I'm a business owner and I've
8 done a contract for somebody and done work for them
9 and -- and I solicit them and say, I'd like you to put a
10 good post on some of these websites about me because, you
11 know, we did a good job on your contract and we'll give
12 you an additional one year where we'll, you know, give
13 you additional service calls and warranty and then that
14 person goes out and makes the postings that I request.

15 And, my question would be is -- is counsel
16 going to claim that that is not advertising? Because I
17 believe that it is. It's -- it involves a quid pro quo.
18 There's a this for that going on at some sort of level
19 and then that person is making postings out there.

20 And what they want you to believe is that if
21 it's posted and we just host the site, then we're
22 completely immune. But as we've asserted to in our
23 briefs, Your Honor, we don't believe that that's the way
24 the law is intended to work.

25 And with respect to the applicability of the

1 Communications Decency Act to false advertising claims, I
2 don't believe that -- counsel makes reference to
3 exclusivity, and I think there's a whole wealth of
4 authority out there, Judge, to the effect that even
5 corporations and businesses have a state law intellectual
6 property right, if you will, of publicity in their own
7 name. And it is for that very reason that -- that the
8 Virginia State Corporation Commission and other state --
9 secretaries of state and corporation similar bodies don't
10 require -- don't allow two entities to register under the
11 exact same name.

12 THE COURT: Well --

13 MR. RAU: And that is an element of
14 exclusivity that goes along with the name of a
15 corporation.

16 Sure, it's not registered with the Patent and
17 Trademark Office or in that regard, but it is still a
18 form of exclusivity that they form in the name.

19 Now --

20 THE COURT: Well, Mr. Rau, I want to stop you
21 because I want to go back to -- the facts of this case
22 are apparently someone did a Google search and
23 ascertained that the listings that appeared when you
24 typed in Google, Serbian Crown Restaurant, it had
25 inaccurate information about the hours it was open and it

1 also had inaccurate information, according to the
2 plaintiff, about whether or not the restaurant was
3 permanently closed. Is that right?

4 MR. RAU: That's correct, Your Honor.

5 THE COURT: So then the issue is really the
6 appearance of that information on a -- in response to a
7 Google search falls within the purview of Communications
8 Decency Act.

9 Now, do you agree that --

10 MR. RAU: And we don't obviously believe that
11 it does.

12 THE COURT: I want to focus just on -- what
13 is Google's status here? Is Google the publisher? Is
14 Google the writer? You said Google in the complaint is
15 the sponsor? What do you say that means? What does it
16 mean?

17 MR. RAU: Well, we're saying that we don't
18 know exactly what the nature or extent of their role is.
19 What we've alleged in the complaint is that they
20 certainly have an interest, commercial interest in the
21 content of this communication of this content, if you
22 will, that's put on their website.

23 And, it is for that reason -- and they
24 also -- and, this is where their motion and their briefs
25 kind of go afar afield from what's alleged in the

1 complaint.

2 They're claiming that they don't have any
3 power to influence market decisions, whereas the --
4 that's not what the complaint alleges. The complaint
5 alleges that they do have an overwhelming market power to
6 influence decisions because of their prevalence as a
7 search engine as well as the map function.

8 THE COURT: I understand -- I understand from
9 your briefs you're making an argument. But I'm trying to
10 laser focus just on the legal question of whether
11 Communications Decency Act immunity applies.

12 So, you agree that Google is not the author
13 of this information. You say they sponsored it, which
14 means it appears in response to a search, is that right?
15 Is that what you're saying in your complaint?

16 MR. RAU: We're saying that we're not sure
17 and that we don't know, that they could have been the
18 author, but that someone else could have been the author,
19 and that's as much as we know, Your Honor. And so in
20 that sense, I think it's an alternative allegation.

21 THE COURT: All right, but --

22 MR. RAU: It's either them or someone else,
23 yes. That pretty much covers the waterfront, Your Honor.

24 As far as --

25 THE COURT: In your complaint, you say that

1 Google is an information and search engine provider; is
2 that right?

3 MR. RAU: That is correct, Your Honor.

4 THE COURT: So that means the person that
5 types in the information, types in a name like Serbian
6 Crown and up pops information.

7 MR. RAU: Yes, Your Honor. And query --

8 THE COURT: Is that an advertisement?

9 MR. RAU: Is what an advertisement?

10 THE COURT: The response that appears when
11 you type in Google, Serbian Crown.

12 MR. RAU: Yes, Your Honor, because what they
13 sell is the rankings. What they sell is what comes up
14 and what -- and the -- with the ad words program, what
15 they sell is what ends up coming up in the search, Your
16 Honor.

17 The complaint also alleges, and this actually
18 is part of the fact patent of this case, that they use
19 this also as a lead in to sell to the people whose
20 information was put there incorrectly, because then they
21 have no choice but to go and change it and say we're the
22 right people.

23 And then lo and behold, as my client did, he
24 received a solicitation saying, you know, now that
25 you've -- you know, entered into our user agreement, here

1 we can offer you these other services to advertise your
2 business. And so, that is a lead in, Your Honor.

3 Whether -- and, that is a proposal of a
4 commercial transaction. The initial posting is not a
5 proposal in and of itself of a commercial transaction.

6 THE COURT: I want to focus on what you just
7 said. So the listing --

8 MR. RAU: In and of itself, yes.

9 THE COURT: The index listing of the
10 restaurant in a response to a Google Maps search or a
11 Google search is not a commercial advertisement; is that
12 right?

13 MR. RAU: It's not a proposal in and of
14 itself of a transaction. It is advertising, however,
15 because it is designed to promote their interest and
16 business of -- I mean, they want to present themselves as
17 well. We're just -- we're furnishing this kind of
18 tableau rousseau, which people populate as a directory.
19 But that's not true. They have an interest in the
20 information that gets up there, Your Honor.

21 THE COURT: That may well be. But the
22 question is whether they're an interactive content
23 provider within the meaning of the Communications Decency
24 Act and there are several cases saying that say that they
25 are. What am I to do with that?

1 MR. RAU: Well, Your Honor, our position, as
2 we've stated in our briefs is that this falls under the
3 intellectual property exception.

4 So, they may --

5 THE COURT: What property are you claiming is
6 at stake here? What intellectual property is at stake
7 here? Is the name Serbian Crown? Is it a trademark
8 Serbian Crown? What intellectual property are you
9 stating?

10 MR. RAU: It would be the name Serbian Crown
11 of Virginia as it relates to a restaurant business in the
12 Commonwealth of Virginia.

13 THE COURT: Well, what is false about the
14 name Serbian Crown?

15 MR. RAU: Your Honor's question was what kind
16 of interest do they have, and they have an interest in a
17 name that is associated with a restaurant that's opened
18 seven days a week --

19 THE COURT: I'm assuming you're conferring a
20 trademark inference; is that a right?

21 MR. RAU: It's not a registered trademark,
22 Judge.

23 THE COURT: Well, you can have a trademark
24 name without a registered trademark. I'm just trying to
25 understand if it's intellectual property --

1 MR. RAU: I mean, I guess if you treated it
2 as unregistered trademark, yes, it would be that
3 particularized restaurant business with that name that
4 operates in Virginia, and --

5 THE COURT: But the Lanham Act talks about
6 sponsoring false advertising. You just said that's the
7 name of the restaurant. So there's nothing false about
8 that, is there?

9 MR. RAU: Well, no, that's a different issue,
10 Your Honor. It's not the fact that they put the name of
11 the restaurant up there. It's the fact of the -- the
12 information that was associated with it.

13 THE COURT: Well, let's focus on that for a
14 second. The information that was listed is wrong,
15 according to plaintiff, and you have a right to believe
16 that it's wrong.

17 MR. RAU: That is correct, Your Honor.

18 THE COURT: I'm trying to understand how that
19 will be a false advertising claim that will fall outside
20 the CDA.

21 MR. RAU: Well, because it's part -- because
22 their interest -- their state law right of publicity and
23 their interest in their name is associated with the
24 restaurant that operates every day of the week, including
25 the days that Google said they were closed.

1 THE COURT: But, this is not a *FriendFinder*
2 case. I understand the *FriendFinder* case has been cited,
3 but this is not a case where someone's identity has been
4 presented on the Internet and has been used somehow for
5 some commercial purpose. This is just a -- this is a
6 search on Google for an ad -- for an advertisement -- not
7 for advertisement, for a map and the hours are wrong.

8 Let's move from that to another issue and
9 that is the issue of proximate cause under the Lanham
10 Act. You cited the *Lexmark* case. Help me with your
11 proximate cause analysis here. Are you saying that the
12 mere fact that the hours are wrong in a listing of Google
13 maps caused the business to close?

14 MR. RAU: Your Honor, I think that that
15 particular argument on the defendant's part really goes
16 to which damages as opposed to whether damages. And --

17 THE COURT: I'm interested in the issue of
18 proximate causation. If you would address that.

19 MR. RAU: Yes, and I'm saying that they're
20 raising of the issue of proximate cause, there are
21 several different types of damages which have flowed from
22 this. There's been a reduction in -- in sales volume,
23 and there's also been the closing of the business.

24 THE COURT: Well, as I understand proximate
25 cause, you have to link the injury with damages and show

1 a causal relationship.

2 And according to you in the complaint, this
3 inaccurate information was posted, I think maybe a year
4 before the restaurant actually closed. And I'm sure,
5 you're not saying that your sole lifeline of business for
6 this restaurant was what happened on Google search,
7 because there's Bing and there's Yahoo and there are
8 other search engines out there that are available as
9 well.

10 You're not saying that Google was the
11 lifeline of The Serbian Crown, are you?

12 MR. RAU: Well, first of all, Your Honor, no
13 we're not saying that they were the lifeline. And what
14 we are saying, however, is that this business would have
15 been better off if Google had done nothing with their
16 information. They would have had better sales if Google
17 had done nothing with their information.

18 But, going beyond that, the complaint to --
19 to -- I want Your Honor to note that the complaint
20 alleges that we discovered, my client discovered the
21 inaccuracy of this information approximately a year or a
22 little bit more than a year before the restaurant closed.
23 But they do not know how long that information was out
24 there in that sort of way, or whether or not there were
25 incantations of it that changed prior to their becoming

1 aware of the incorrect part.

2 So, let's not operate from the misconception
3 that this is all about some one-year period of time,
4 Judge. That has to do with when it was discovered.

5 But going beyond that, my client doesn't have
6 to prove as a matter of proximate cause -- first of all,
7 we're on a 12(b)(6).

8 THE COURT: You don't have to prove anything
9 but even *Lexmark* acknowledges you have to set forth facts
10 to plausibly support the claim. And if you do not do
11 that, then the claim can't go forward.

12 MR. RAU: And what we've alleged in the
13 complaint, Your Honor, is that people were, in fact,
14 deterred away and obviously for a business, it's no
15 different than if somebody goes out there and says about
16 a lawyer who practices, yeah, did you hear that he died?

17 Once you've heard that, you may not ever try
18 and go see that lawyer even though it may be inaccurate.
19 And by the same token, once you've heard that they're
20 closed on weekends, you may never go back and try to go
21 there on weekends.

22 So --

23 THE COURT: You raise a point there and that
24 was another issue that you raised and that is the listing
25 that was permanently closed -- is the restaurant open

1 now?

2 MR. RAU: No.

3 THE COURT: All right. So the statement that
4 it's permanently closed is not false then, is it?

5 MR. RAU: Well, it is false, because there's
6 a characterization there, Your Honor, permanently closed.
7 I mean, it has a certain finality to it that my client
8 disagrees with.

9 And in fact, the space has not yet been
10 filled by another business, Your Honor.

11 THE COURT: And when did it close?

12 MR. RAU: I think it was April of 2013.

13 THE COURT: More than a year ago, okay.

14 MR. RAU: Yeah. So --

15 THE COURT: Well, I was going to say that
16 I've asked --

17 MR. RAU: Your Honor -- I'm sorry, go ahead.

18 THE COURT: I was going to say I've asked you
19 the questions that I have. But if there was something
20 further you want to say you were not given a chance to
21 say, I'll give you a chance to say it.

22 MR. RAU: Your Honor, I think with respect to
23 the interpretation -- interpretation of Section 230, I --
24 there is an intellectual property interest here that my
25 client has in the name that they developed and the

1 business that they developed --

2 THE COURT: What do you call it?

3 MR. RAU: -- over a period.

4 THE COURT: What do you call the intellectual
5 interest property that the company has?

6 MR. RAU: I think it's goodwill, Your Honor I
7 mean --

8 THE COURT: Okay.

9 MR. RAU: -- garden variety commercial
10 goodwill which is part of what the Lanham Act is supposed
11 to be protecting.

12 And, I think that the impact of the *Lexmark*
13 case is -- has to do with, Your Honor, the fact that
14 competition in this type of situation can take a lot of
15 different types of forms. It's not a traditional type of
16 competitive paradigm that the defendant has set up here.

17 And so, it is our belief that that's one of
18 the reasons the Supreme Court unanimously opened up the
19 standing issue was in order to take account of all of
20 these concatenations that occur, Internet companies going
21 into producing cars and saying well, we're not competing
22 with the automobile industry because we're doing
23 something completely different.

24 And I think part of what's been lost in all
25 of this jurisprudence with respect to the Communications

1 Decency Act is that -- is that this type of immunity is
2 very rare, didn't exist at common law. It's in
3 dirigation of common law, Your Honor. And they're saying
4 that it's to be accorded all of these expansive
5 definitions, and that everything revolves around that.

6 And what I'm offering to the Court, Your
7 Honor, is that they built in in this exception for a
8 reason and it was meant to apply to commercial parties
9 whose interests are being damaged. And that's precisely
10 what we have in this case.

11 I don't think that the Court would similarly
12 pretermite on a 12(b)(6) in any sort of fashion issues of
13 proximate cause, for example, in a medical malpractice
14 action where the defendant just basically comes in and
15 say, well it's preposterous that somebody could have
16 paresthesia in their lower right leg based upon what
17 happened in their upper spine on the left side.

18 And that's not the type of thing that a
19 12(b)(6) is designed for when it comes to proximate cause
20 and the various components of the damages that exists,
21 Your Honor.

22 THE COURT: All right.

23 MR. RAU: So, I think that's about all that I
24 have to say about that.

25 THE COURT: Thank you very much.

1 Mr. Kramer.

2 MR. KRAMER: Thank you, Your Honor, just a
3 few words quickly.

4 Your Honor asked a question about whether the
5 CDA, Communications Decency Act covers federal claims.
6 If you look at the structure of the CDA, it's quite clear
7 that it does.

8 For example, there is an exception in the CDA
9 for wire tap claims under federal law. You wouldn't need
10 that exception if the CDA was only applicable to state
11 claims.

12 Congress has other exceptions to the
13 protections provided by the CDA for claims involving
14 child exploitation under federal law.

15 Again, you wouldn't need those exceptions if
16 the statute only precluded claims under state law.

17 With respect to the IP exception, Your Honor,
18 there are a couple of cases that were cited in the
19 plaintiff's papers. One of them, I think, makes clear
20 that the exception does not cover false advertising. And
21 that is the *Quiznos* case, the *Subway versus Quiznos* case.
22 I think it's QIP and Doctor. In that case, the Court was
23 quite prepared to apply the CDA to protect the online
24 service provider from a false advertising claim but
25 ultimately concluded it couldn't do that because the

1 service provider also played the role of creating the
2 consent. But, there wasn't any issue about applying the
3 CDA to a false advertising claim.

4 Also, on the issue of the CDA -- oh, the
5 other case is *FriendFinder*, Your Honor. And in that
6 case, there was no question about the applicability of
7 230 to the false advertising claim because it -- the ads
8 were clearly created by the service. They were ads for
9 the service. There was no discussion as to whether the
10 IP exception to the CDA applied because the CDA was
11 inapplicable on its face to ads created by the service
12 for its own goods and services.

13 THE COURT: All right.

14 MR. KRAMER: I want to touch, Your Honor, on
15 *Nemet*, in the Fourth Circuit and the pleading
16 requirements in the CDA case. It's not enough to say in
17 a CDA case we don't know who created this content. *Nemet*
18 is instructive, because in *Nemet*, the plaintiff actually
19 alleged that the service provider created the content,
20 some of the content.

21 And the Fourth Circuit in reviewing your
22 decision said that's conclusory and speculative. You
23 haven't alleged facts from which I could reasonably
24 conclude that the service provider fabricated these
25 reviews of the auto -- auto dealer.

1 I'm going -- because the CDA is an immunity
2 from suit and would be lost if I allowed this case to go
3 forward, I'm going to dismiss it, notwithstanding the
4 fact that you actually alleged that the content at issue
5 was created by the defendant service provider.

6 We don't have that allegation here. If we
7 did have that allegation here that Google actually
8 created this content, it wouldn't be plausible. It
9 wouldn't be correct, but we don't have that allegation.

10 In *Nemet*, they had that allegation directly,
11 and the Fourth Circuit still dismissed the case because
12 this is an immunity, and an immunity from suit, not
13 simply the right to litigate over the question of whether
14 it should apply.

15 THE COURT: Is the issue of proximate cause a
16 question I have to wait on, on a 12(b)(6) motion?

17 MR. KRAMER: You do not have to decide the
18 question of proximate cause on a 12(b)(6) motion, Your
19 Honor, because the case that plaintiffs have brought
20 fails in the first instance because this isn't an ad and
21 in the second instance because Communications Decency Act
22 applies to bar the claim.

23 Last point, Your Honor, on the question of
24 whether this is an ad, the argument was advanced that
25 because this is in service of advertising on Google that

1 somehow Google is an ad supported service, therefore,
2 what is displayed through Google must necessarily
3 constitute an ad.

4 The same could be said about the Washington
5 Post or any television broadcaster, CBS. They are
6 ad-supported services. That does not make the editorials
7 in the Washington Post advertisements, even though it is
8 in service of gathering an audience so they can sell
9 advertising.

10 Likewise 60 Minutes is not an advertisement
11 for CBS. It is information that is ad supported. So too
12 is the Google service. It provides all sorts of
13 information that is ad supported that does not transmute
14 everything on the service into an add.

15 That's all I have, Your Honor.

16 THE COURT: Thank you very much.

17 Let the record reflect this matter is before
18 the Court on the defendant's Google's motion to dismiss
19 Count II false advertising, where the plaintiff The
20 Serbian Crown claims that Google posted allegedly false
21 information regarding The Serbian Crown's restaurant
22 which proximately caused the restaurant to loss revenue,
23 business, goodwill and ultimately go out of business.

24 In addition, Google argues that Serbian
25 Crown's factual allegations are insufficient to plausibly

1 establish any claims that could survive Google's immunity
2 under the Communications Decency Act.

3 This is a case, of course, on 12(b)(6) I've
4 got to view the allegation in the light most favorable to
5 the plaintiff where The Serbian Crown, a restaurant
6 located in Great Falls that served Russian and French and
7 Serbian cuisine allegedly went out business in April 2013
8 and Google, an Internet company based in California,
9 which offer search services including maps and
10 directories.

11 Plaintiff alleges here that sometime before
12 April 6, 2012, Google hosted informational business
13 listing for Serbian Crown through Google Maps and Google
14 Places which included the restaurant's address, telephone
15 number and along with the map and that's in the complaint
16 paragraph 11.

17 According to the complaint, on April 6, 2023,
18 Serbian Crown learned from a customer that Google's
19 listing inaccurately stated that the restaurant was
20 closed Saturdays, Sundays and Mondays and plaintiff was
21 unaware how long this listing had been on the -- produce
22 in response to a Google search.

23 Thereafter, Serbian Crown attempted to
24 contact Google in order to resolve the problem, and they
25 allege in paragraph 21 they were unable to resolve it.

1 And eventually, Serbian Crown hired an
2 Internet marketing consultant to correct the inaccurate
3 information regarding its operating hours which is
4 eventually remedied without Google's assistance. And
5 that's paragraphs 22 and 33.

6 The complaint also alleged that because of
7 the false information contained in the Google listing,
8 previously regular and frequent customers stop visiting
9 the restaurant on weekends and alleges that the
10 inaccurate information about operating hours, deterred
11 would be patrons from a broader geographic area from
12 visiting the restaurant. And because Google has
13 significant online presence, that Google's listing
14 deceived a substantial segment of Serbian Crown's
15 consumer based and caused reduction in their customer
16 traffic which ultimately dwindled Serbian Crown's revenue
17 and business goodwill. So the restaurant was forced to
18 close on April 2013. And these are all paragraphs 17,
19 19, 22 and 23.

20 Ultimately, the listing on April -- as of
21 April 3, 2014, lists Serbian Crown as permanently closed
22 and this is under Google Maps and Places. That's
23 paragraph 25.

24 So the legal question here is whether the
25 plaintiff may state a claim for false advertising against

1 Google here under the Communications Decency Act. And
2 Count II is a Lanham Act claim which deals with false
3 advertising.

4 And the defendant here argues first that
5 Google's listing on a search on the maps or places it's
6 not an advertisement and that it would be immune under
7 the Communications Decency Act in any event because
8 Google is an interactive computer service.

9 I conclude the motion should be granted for
10 two reasons. First, I think Google is and I conclude
11 Google is immune from Serbian Crown's false advertising
12 claim under the provisions of Communications Decency Act
13 because Google is an interactive computer service as
14 defined by the act, and that's 47 U.S. Code Section
15 230(f)(2). And the information about Serbian Crown's
16 operating hours was provided by another information
17 content provider, and therefore, Google cannot be held
18 liable for inaccurate content supplied by third party on
19 its website in response to a search.

20 Moreover, second they cannot -- the complaint
21 cannot go forward because Google's listing of The Serbian
22 Crown's restaurant is not a commercial advertising and
23 promotion under the Lanham Act, and Serbian Crown failed
24 to allege any facts establishing that the listing
25 proximately caused the restaurant to close, lose revenue,

1 goodwill.

2 The Communications Decency Act as we know,
3 precludes claims. It is intended to be an immunity. And
4 here, the act itself 230 says "No provider or user of
5 interactive computer service shall be treated as
6 publisher or speaker of any information provided by
7 another information content provider". And that's
8 Section 230(c)(1).

9 And the act creates federal immunity to any
10 cause of action that would make an interactive computer
11 service provider liable for information originating from
12 a third party in the *Zuran Z-U-R-A-N versus American*
13 *Online* case.

14 I had a case *Rosetta Stone versus Google*, and
15 that Congress has established a general rule that
16 providers of interactive computer services are liable
17 only for speech that is properly attributable to them
18 under the *Nemet Chevrolet* case.

19 So immunity is given broad scope and it
20 ordinarily preempts state law claims such as the foregone
21 negligence claim that has been withdrawn. And similarly
22 would, I think bar, and I conclude bars the false
23 advertising claim because Lanham Act holding has the
24 same -- the holding further exacerbates the purpose which
25 is protecting interactive computer service providers like

1 Google from liability for third party content hosted on
2 their websites.

3 So, there's no difference to me between
4 whether it's state law or the federal law here. It --
5 the Communications Decency Act precludes holding
6 interactive computer service liable merely because they
7 allowed the content to be posted online, and that's *Nemet*
8 *Chevrolet*.

9 Google has been held to be an interactive
10 computer service by a number of different cases, and
11 they're cited in the briefs. And the immunity would
12 apply to these claims for false advertising.

13 The second sub-issue is whether the false
14 advertising claim falls within the exception to the
15 intellectual property law that's exempt from the
16 Communications Decency Act. And Serbian Crown has cited
17 *Doe versus FriendFinder*. And *FriendFinder* is
18 distinguishable on several grounds.

19 But first of all, *FriendFinder* published the
20 information. Second, it was a site that was intended to
21 draw individuals to do commercial transactions. And here
22 we're talking about -- and *FriendFinder* was also a claim
23 about the plaintiff's claim for the right of publicity --
24 to be free from publicity which is a state law claim.

25 But here we're not talking about that. We're

1 talking about a false advertising claim. And it seems to
2 me The Serbian Crown does not allege here any right of
3 publicity. This is about false advertising and
4 inaccurate information being posted.

5 So I think that -- I conclude that Google is
6 immune from Serbian Crown's false advertising claim
7 because the CDA absolved providers from liability.

8 As it relates to the issue of whether or not
9 an advertisement -- whether or not there was an
10 advertisement here, I do not conclude that this was an
11 advertisement.

12 But even if it was under the *Nemet Chevrolet*
13 case, I would want to turn to the issue of proximate
14 cause just briefly and that is under the *Lexmark* case
15 which has been cited by plaintiff and defense counsel,
16 causation still remains an inquiry under the Lanham Act.

17 And here, plaintiff has not plausibly alleged
18 proximate cause in order to assert a false advertising
19 claim if one were to be allowed to proceed because the
20 claim here is that an inaccurate listing of hours of
21 operation led to the loss of goodwill, led to the loss of
22 revenue and ultimately the closing of the restaurant when
23 plaintiff alleges that there are multiple Internet search
24 engines that have in response produced information about
25 Serbian Crown that was accurate. Customers can still --

1 could have still called the restaurant.

2 And I have difficulty concluding that the
3 interactive listing of time and hours proximately led to
4 the cause of closing the restaurant. And I think that
5 under the *Lexmark* case, in the opinion Justice Scalia
6 asserts that it is always up to the Court to ascertain
7 whether or not a claim plausibly suggests proximate
8 cause. And in the particular case, I conclude that
9 there's not a plausibility suggestion of proximate cause
10 that would survive if the claim were to be stayed.

11 So to be clear, my judgment is that the
12 action is barred by Communications Decency Act. So I
13 dismiss the matter for the reasons just stated. And I
14 don't think there are any facts that can be pled under
15 the circumstances here to allow for re-pleading.

16 So I'm going to dismiss the matter and leave
17 to amend will not be granted.

18 Thank you. We're in recess.

19 Thank you, counsel, for the quality of your
20 preparation. Good afternoon.

21 (Proceeding concluded at 3:46 p.m.)
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1 CERTIFICATE OF REPORTER

2
3 I, Renecia Wilson, an official court
4 reporter for the United State District Court of Virginia,
5 Alexandria Division, do hereby certify that I reported by
6 machine shorthand, in my official capacity, the
7 proceedings had upon the motions in the case of The
8 Serbian Crown vs. Google, Inc.

9 I further certify that I was authorized and
10 did report by stenotype the proceedings and evidence in
11 said motions, and that the foregoing pages, numbered 1 to
12 36, inclusive, constitute the official transcript of said
13 proceedings as taken from my shorthand notes.

14 IN WITNESS WHEREOF, I have hereto subscribed
15 my name this 27th day of August, 2014.

16
17 /s/
18 _____
19 Renecia Wilson, RMR, CRR
20 Official Court Reporter
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23
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